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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 KATHRYN M. JOLLEY,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner  
14 of the Social Security Administration,

15 Defendant.

CASE NO. 10-cv-5709-JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local  
17 Magistrate Judge Rule MJR 13. (See also Notice of Initial Assignment to a U.S. Magistrate  
18 Judge and Consent Form, ECF No. 4; Consent to Proceed Before a United States Magistrate  
19 Judge, ECF No. 10). This matter has been fully briefed. (See ECF Nos. 15, 21, 22).

20 After considering and reviewing the record, the Court finds that the ALJ failed to  
21 evaluate properly plaintiff's credibility and testimony. The ALJ also failed to evaluate properly  
22 the lay opinion evidence. Finally, the ALJ's determination of plaintiff's residual functional  
23 capacity is not supported by substantial evidence in the record as a whole. For these reasons, and  
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1 based on the relevant record, this matter is reversed and remanded to the administration pursuant  
2 to sentence four of 42 U.S.C. § 405(g).

### 3 BACKGROUND

4 Plaintiff, KATHRYN M. JOLLEY, was thirty-six years old on her alleged disability  
5 onset date of January 15, 2003 (Tr. 65). According to the lay opinion evidence and the testimony  
6 of plaintiff, plaintiff was very active and high energy, including starting her own business and  
7 being civically active, until her gradual decline in functioning in or around 1999, or at least by  
8 her disability onset of January 15, 2003 (Tr. 36-37, 125, 245-52, 255-56, 259, 262-64). At that  
9 time, according to plaintiff, she began experiencing fatigue, a large amount of weight loss caused  
10 by vomiting, “mental fog” and sores in her mouth (Tr. 36, 37). Plaintiff testified that she was no  
11 longer able to run her business without hiring additional employees and “would sit behind in a  
12 chair, and my mother or a staff member would run the store” (Tr. 39-41). She was at work for  
13 approximately five hours a day and was able to lift 50 pounds “rarely” (Tr. 42). The record  
14 suggests that her doctors took many years and many tests before coming to a diagnosis for  
15 plaintiff of systemic lupus erythematosus, in part, because the ulcerations caused by lupus  
16 usually were “not painful [and] usually not this profound” (see Tr. 586).

### 17 PROCEDURAL HISTORY

18 On September 17, 2008, plaintiff filed an application for Social Security disability  
19 benefits (“SSDI”), 42 U.S.C. § 423 (Title II) and Supplemental Security Income benefits (“SSI”),  
20 42 U.S.C. § 1382(a) (Title XVI), alleging disability onset of January 15, 2003 (Tr. 125-34). Her  
21 Title XVI application for SSI was allowed, based on a finding that plaintiff was disabled as of  
22 September 14, 2007 (Tr. 10, 66, 188-89). Because plaintiff’s date last insured was December 31,  
23 2003, she must have been disabled before December 31, 2003 in order to be entitled to a period  
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1 of disability and Title II SSDI benefits (Tr. 10, 189). For this reason, her application for SSDI  
2 Title II benefits was denied initially and following reconsideration (Tr. 10, 65, 67, 188-89). The  
3 denial of plaintiff's application for Title II SSDI benefits forms the subject of the request for  
4 review here.

5 Plaintiff's requested hearing on the denial of her Title II SSDI benefits was held on  
6 January 28, 2010 before Administrative Law Judge Helen Francine Strong ("the ALJ") (Tr. 24-  
7 64). On March 15, 2010, the ALJ issued a written decision in which she found that plaintiff  
8 suffered from the severe impairments of systemic lupus erythematosus, osteoarthritis and  
9 osteoporosis (Tr. 12, 7-17). However, the ALJ found that plaintiff "was not under a disability, as  
10 defined in the Social Security Act, at anytime from January 15, 2003, the alleged onset date,  
11 through December 31, 2003, the date last insured" (Tr. 17).

12 On August 24, 2010, the Appeals Council denied plaintiff's request for review, making  
13 the written decision by the ALJ the final agency decision subject to judicial review (Tr. 1-3). See  
14 20 C.F.R. § 404.981. On September 30, 2010, plaintiff attached her complaint seeking review of  
15 the ALJ's written decision to her motion to proceed *in forma pauperis* (see ECF Nos. 1, 3). In  
16 her opening brief, plaintiff claims that the ALJ improperly evaluated: (1) plaintiff's credibility;  
17 (2) the lay testimony; and, (3) plaintiff's residual functional capacity ("RFC") (ECF No. 15, pp.  
18 5-6). Plaintiff also questions whether or not the ALJ erred by failing to include non-exertional  
19 limitations in the hypothetical question asked of the vocational expert (id. at p. 5).

#### 20 STANDARD OF REVIEW

21 Plaintiff bears the burden of proving disability within the meaning of the Social Security  
22 Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999); see also  
23 Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines disability as the  
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1 “inability to engage in any substantial gainful activity” due to a physical or mental impairment  
2 “which can be expected to result in death or which has lasted, or can be expected to last for a  
3 continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).  
4 Plaintiff is disabled under the Act only if plaintiff’s impairments are of such severity that  
5 plaintiff is unable to do previous work, and cannot, considering the plaintiff’s age, education, and  
6 work experience, engage in any other substantial gainful activity existing in the national  
7 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094,  
8 1098-99 (9th Cir. 1999).

9 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
10 social security benefits if the ALJ's findings are based on legal error or not supported by  
11 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th  
12 Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is  
13 more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion.”” Magallanes v. Bowen, 881 F.2d 747,  
15 750 (9th Cir. 1989) (*quoting* Davis v. Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); see also  
16 Richardson v. Perales, 402 U.S. 389, 401 (1971). The Court ““must independently determine  
17 whether the Commissioner’s decision is (1) free of legal error and (2) is supported by substantial  
18 evidence.”” See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing* Moore v. Comm’r  
19 of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen v. Chater, 80 F.3d 1273,  
20 1279 (9th Cir. 1996).

21 However, “regardless whether there is enough evidence in the record to support the  
22 ALJ’s decision, principles of administrative law require the ALJ to rationally articulate the  
23 grounds for h[is] decision and [the courts] confine our review to the reasons supplied by the  
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1 ALJ.” Steele v. Barnhart, 290 F.3d 936, 941(7th Cir. 2002) (*citing* SEC v. Chenery Corp., 318  
2 U.S. 80, 93-95 (1943) (other citations omitted)); see also Stout v. Commissioner of Soc. Sec.,  
3 454 F.3d 1050, 1054 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a ground  
4 that the agency did not invoke in making its decision”) (citations omitted); Griemsmann v.  
5 Astrue, 147 Soc. Sec. Rep. Service 286, 2009 U.S. Dist. LEXIS 124952 at \*9, (W.D. Wash.  
6 2009). For example, “the ALJ, not the district court, is required to provide specific reasons for  
7 rejecting lay testimony.” Stout v. Commissioner of Soc. Sec., 454 F.3d 1050, 1054 (9th Cir.  
8 2006) (*citing* Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993)).

### 9 DISCUSSION

#### 10 1. The ALJ failed to evaluate properly plaintiff’s credibility.

11 If the medical evidence in the record is not conclusive, sole responsibility for resolving  
12 conflicting testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694  
13 F.2d 639, 642 (9th Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971);  
14 see also Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980)). An ALJ is not “required to  
15 believe every allegation of disabling pain” or other non-exertional impairment. Fair v. Bowen,  
16 885 F.2d 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. § 423(d)(5)(A)). Even if a claimant “has an  
17 ailment reasonably expected to produce *some* pain; many medical conditions produce pain not  
18 severe enough to preclude gainful employment.” Fair, 885 F.2d at 603.

19 Nevertheless, the ALJ’s credibility determinations “must be supported by specific, cogent  
20 reasons.” Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). In evaluating  
21 a claimant's credibility, the ALJ cannot rely on general findings, but “‘must specifically identify  
22 what testimony is credible and what evidence undermines the claimant's complaints.’” Greger v.  
23 Barnhart, 464 F.3d 968, 972 (9th Cir. 2006) (*quoting* Morgan v. Comm’r of Soc. Sec. Admin.,

1 169 F.3d 595, 599 (9th Cir. 1999)); Reddick, 157 F.3d at 722 (citations omitted); Smolen v.  
2 Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (citations omitted). The ALJ may consider “ordinary  
3 techniques of credibility evaluation,” including the claimant's reputation for truthfulness and  
4 inconsistencies in testimony, and may also consider a claimant’s daily activities, and  
5 “unexplained or inadequately explained failure to seek treatment or to follow a prescribed course  
6 of treatment.” Smolen, 80 F.3d at 1284.

7       The determination of whether or not to accept a claimant's testimony regarding subjective  
8 symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; Smolen, 80 F.3d at  
9 1281 (*citing* Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). First, the ALJ must determine  
10 whether or not there is a medically determinable impairment that reasonably could be expected  
11 to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); Smolen, 80 F.3d at  
12 1281-82. Once a claimant produces medical evidence of an underlying impairment, the ALJ  
13 may not discredit the claimant's testimony as to the severity of symptoms “based solely on a lack  
14 of objective medical evidence to fully corroborate the alleged severity of pain.” Bunnell v.  
15 Sullivan, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (*citing* Cotton, 799 F.2d at 1407).  
16 Absent affirmative evidence that the claimant is malingering, the ALJ must provide specific  
17 “clear and convincing” reasons for rejecting the claimant's testimony. Smolen, *supra*, 80 F.3d at  
18 1283-84; Reddick, 157 F.3d at 722 (*citing* Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996);  
19 Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

20       Regarding activities of daily living, the Ninth Circuit “has repeatedly asserted that the  
21 mere fact that a plaintiff has carried on certain daily activities . . . . does not in any way  
22 detract from her credibility as to her overall disability.” Orn v. Astrue, 495 F.3d 625, 639 (9th  
23 Cir. 2007 (*quoting* Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001))). The Ninth Circuit  
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1 specified “the two grounds for using daily activities to form the basis of an adverse credibility  
2 determination.” (1) whether or not they contradict the claimant’s other testimony and (2) whether  
3 or not the activities of daily living meet “the threshold for transferable work skills.” Orn, 495  
4 F.3d at 639 (*citing* Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). As stated by the Ninth  
5 Circuit, the ALJ “must make ‘specific findings relating to the daily activities’ and their  
6 transferability to conclude that a claimant’s daily activities warrant an adverse credibility  
7 determination.” Orn, 495 F.3d at 639 (*quoting* Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir.  
8 2005)).

9         The ALJ here did not conclude that plaintiff was malingering, but found that plaintiff’s  
10 “medically determinable impairments could reasonably be expected to have caused some of the  
11 alleged symptoms; however, the claimant’s statements concerning the intensity, persistence and  
12 limiting effects of these symptoms are not credible to the extent they are inconsistent with the  
13 above residual functional capacity assessment through the date last insured” (Tr. 14). Although  
14 the ALJ found that plaintiff’s medically determinable impairments could have caused only some  
15 of plaintiff’s alleged symptoms, the ALJ fails to identify any symptoms alleged by plaintiff that  
16 was not expected to have been caused by her medically determinable impairments. This was  
17 error.

18         The Court observes that the ALJ referenced a medical opinion from August 5, 2002 that  
19 plaintiff was not demonstrating very many manifestations of Lupus; however, the ALJ failed to  
20 assess the fact that the doctor opined as such, in part, because the ulcerations caused by lupus  
21 usually were not as painful nor as profound as what plaintiff was experiencing (see Tr. 586).

22         In discrediting plaintiff’s testimony, the ALJ relied on the fact that plaintiff “worked for  
23 about 15 to 20 hours weekly in 2003” (Tr. 14-15). The ALJ noted plaintiff’s testimony that she  
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1 primarily sat for about 5 hours on a day that she worked, and that she signed checks and did  
2 some paperwork (Tr. 15). The ALJ found that plaintiff's limited "work activity strongly indicates  
3 that she was capable of performing a limited range of sedentary work through the date last  
4 insured" (id.).

5 Although the ALJ found plaintiff capable of performing a "limited" range of sedentary  
6 work, the ALJ did not specify what limited the range of sedentary work that plaintiff was capable  
7 of performing. This was error as the ALJ "'must specifically identify what testimony is credible  
8 and what evidence undermines the claimant's complaints.'" Greger, supra, 464 F.3d at 972  
9 (quoting Morgan, supra, 169 F.3d at 599). Plaintiff did not allege that she was not capable of  
10 sedentary work during the relevant period if such work was limited to sitting on a chair for  
11 approximately 5 hours at a time, for a maximum of 20 hours a week. Therefore, it is unclear why  
12 the ALJ relied on this factor in order to discount plaintiff's credibility.

13 Without further explanation, the Court is not able to conclude that this factor provides  
14 any support for the ALJ's adverse credibility determination. For example, if the ALJ  
15 characterized the sedentary work that plaintiff was capable of as "limited" because she could  
16 only do it for five hours at a time and for about 15-20 hours a week, as the ALJ referenced in this  
17 paragraph, then, according to the testimony by the medical expert at the hearing, plaintiff would  
18 not have been able to work "on a eight-hour day, five days a week" basis (Tr. 58). According to  
19 the vocational expert, this limitation also would have precluded plaintiff's ability to "perform the  
20 past relevant work or any work" on a "regular and consistent basis" (Tr. 63). Because the ALJ is  
21 required to evaluate a claimant's "ability to work on a sustained basis," this factor does not  
22 appear to provide any support for the ALJ's adverse credibility determination. See 20 C.F.R. §  
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1 404.1512(a); see also 20 C.F.R. § 404.1545(b) (the ALJ should determine a claimant's "residual  
2 functional capacity for work activity on a regular and continuing basis").

3 None of the reasons discussed above provide any support for the ALJ's adverse  
4 credibility determination. The ALJ only relied on one additional reason to discount plaintiff's  
5 credibility. She concluded that the objective medical evidence did not support a finding that  
6 plaintiff's functional limitations were as severe as plaintiff alleged that she was suffering (Tr.  
7 14). However, once a claimant produces medical evidence of an underlying impairment, the ALJ  
8 may not discredit the claimant's testimony as to the severity of symptoms "based solely on a lack  
9 of objective medical evidence to fully corroborate the alleged severity of pain." Bunnell, supra,  
10 947 F.2d at 343, 346-47; Cotton, supra, 799 F.2d at 1407.

11 For these reasons and based on a review of the relevant record, the Court concludes that  
12 the ALJ failed to provide clear and convincing reasons to discount plaintiff's credibility. See  
13 Smolen, supra, 80 F.3d at 1283-84; Reddick, 157 F.3d at 722.

14 2. The ALJ did not evaluate properly the lay opinions.

15 Pursuant to the relevant federal regulations, in addition to "acceptable medical sources,"  
16 that is, sources "who can provide evidence to establish an impairment," see 20 C.F.R. §  
17 404.1513 (a), there are "other sources," such as friends and family members, who are defined as  
18 "other non-medical sources," see 20 C.F.R. § 404.1513 (d)(4). See also Turner v. Comm'r of  
19 Soc. Sec., 613 F.3d 1217, 1223-24 (9th Cir. 2010) (*citing* 20 C.F.R. § 404.1513(a), (d)). An ALJ  
20 may disregard opinion evidence provided by "other sources," characterized by the Ninth Circuit  
21 as lay testimony, "if the ALJ 'gives reasons germane to each witness for doing so.'" Turner,  
22 supra, 613 F.3d at 1224 (*citing* Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001)); see also Van  
23 Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996). This is because "[i]n determining  
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1 whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a  
2 claimant's ability to work.” Stout v. Commissioner, Social Security Administration, 454 F.3d  
3 1050, 1053 (9th Cir. 2006) (*citing* Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993)).

4 Recently, the Ninth Circuit characterized lay witness testimony as “competent evidence,”  
5 again concluding that in order for such evidence to be disregarded, “the ALJ must provide  
6 ‘reasons that are germane to each witness.’” Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir.  
7 2009) (*quoting* Van Nguyen, supra, 100 F.3d at 1467). In this recent Ninth Circuit case, the court  
8 noted that an ALJ may not discredit “lay testimony as not supported by medical evidence in the  
9 record.” Bruce, 557 F.3d at 1116 (*citing* Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996)).

10 The ALJ grouped together all of the lay evidence offered by four different individuals  
11 and gave a single reason to disregard all of them (Tr. 15). The ALJ provided a one-line  
12 conclusion: “As to lay opinion, the claimant’s father and friends of the claimant provided  
13 statements indicating that the claimant has been unable to work, noting significant weight loss,  
14 pain symptoms, and diminished strength (citations). While these accounts may reflect their  
15 respective observations to some extent, the scant medical evidence through the date last insured  
16 does not support finding a more restrictive residual functional capacity than for a limited range  
17 of sedentary work.” *Id.*

18 This analysis, or lack thereof, is improper and demonstrates that the ALJ did not give a  
19 reason pertinent to each individual. According to the Ninth Circuit, “the ALJ must provide  
20 ‘reasons that are germane to each witness.’” Bruce, supra, 557 F.3d at 1115 (*quoting* Van  
21 Nguyen, supra, 100 F.3d at 1467). Not only did the ALJ here not give a germane reason for each  
22 lay witness, but also, the reason given by the ALJ to discredit all of the lay opinions was  
23 improper. According to the Ninth Circuit, an ALJ may not discredit “lay testimony as not  
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1 supported by medical evidence in the record.” Bruce, 557 F.3d at 1116; Smolen, supra, 80 F.3d  
2 at 1289. Therefore, for the stated reasons and based on the relevant record, the Court concludes  
3 that the ALJ committed legal error in her evaluation of the lay opinions. See Bruce, supra, 557  
4 F.3d at 1115; Smolen, supra, 80 F.3d at 1289.

5 In addition, “where the ALJ’s error lies in a failure to properly discuss competent lay  
6 testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless  
7 it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could  
8 have reached a different disability determination.” Stout, supra, 454 F.3d at 1056 (reviewing  
9 cases). Even the ALJ suggested that the lay opinions indicated “that the claimant has been unable  
10 to work,” and further indicated that plaintiff suffered from weight loss, pain symptoms and  
11 diminished strength (Tr. 15). Therefore, the Court cannot conclude with confidence that no  
12 reasonable ALJ, when fully credited all of the lay opinion evidence, could have reached a  
13 different disability determination. See Stout, supra, 454 F.3d at 1056. As a consequence, the  
14 ALJ’s legal error in her evaluation of the lay evidence cannot be considered harmless error. See  
15 Stout, supra, 454 F.3d at 1056.

16 3. The ALJ erred in failing to consider explicitly plaintiff’s alleged fatigue.

17 The ALJ failed to consider explicitly plaintiff’s alleged fatigue. However, the vocational  
18 expert suggested that this symptom combined with plaintiff’s alleged inability to work eight  
19 hours a day, five days a week, would have precluded plaintiff’s ability to “perform the past  
20 relevant work or any work” on a “regular and consistent basis” (see Tr. 63). Therefore, the ALJ’s  
21 failure to give any reason to discredit plaintiff’s allegation of fatigue was relevant to the ultimate  
22 disability conclusion and was not harmless error. See Stout, supra, 454 F.3d at 1054-55 (legal  
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errors committed by the ALJ in the context of social security appeals may be considered harmless where the error is irrelevant to the ultimate disability conclusion).

4. The ALJ did not determine properly plaintiff's residual functional capacity.

If an ALJ cannot determine whether or not a claimant is disabled based on a claimant's current work activity or on medical factors alone and a claimant has a severe impairment, a review is made of the claimant's residual functional capacity. See Social Security Ruling "SSR" 96-8p, 1996 SSR LEXIS 5 at \*3-\*4. A determination regarding "residual functional capacity 'is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis.'" Brown v. Astrue, 405 Fed. Appx. 230; 2010 U.S. App. LEXIS 26760 (9th Cir. 2010) (*per curiam*) (unpublished opinion) (*quoting id.*) (*citing* 20 C.F.R. § 416.945; Reddick, *supra*, 157 F.3d at 724). Residual functional capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs." 20 C.F.R. § 404, Subpart P, App. 2 § 200.00(c).

In evaluating whether or not a claimant satisfies the disability criteria, the Commissioner must evaluate the claimant's "ability to work on a sustained basis." See 20 C.F.R. § 404.1512(a). The regulations further specify: "When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis." 20 C.F.R. § 404.1545(b).

The ALJ failed to consider properly the lay opinions as well as plaintiff's testimony and credibility. These legal errors likely resulted in an erroneous residual functional capacity determination. In addition, the ALJ also did not appear to take into consideration plaintiff's fatigue when making the determination regarding plaintiff's residual functional capacity, yet the ALJ did not provide any proper reasons to discount plaintiff's allegations regarding the level of

1 fatigue she suffered. Furthermore, the ALJ did not provide any reason to discredit plaintiff's  
2 testimony that she worked only 5 hours in a day during the relevant period of time, and only  
3 worked, at a maximum, 20 hours a week, even though the ALJ is required to determine a  
4 claimant's residual functional capacity for work activity on a regular and continuing basis. See  
5 20 C.F.R. § 404.1545(b).

6 For these reasons and based on the relevant record, the Court concludes that the ALJ's  
7 residual functional capacity determination was not supported by substantial evidence in the  
8 record as a whole. Likewise, due to the ALJ's erroneous consideration of the lay opinions and  
9 plaintiff's credibility and fatigue as well as plaintiff's residual functional capacity, the  
10 hypothetical presented to the vocational expert by the ALJ here was not complete. Therefore, this  
11 matter should be remanded to the administration for further consideration.

12 5. This matter should not be remanded with a direction for an award of benefits.

13 The Ninth Circuit has put forth a "test for determining when evidence should be  
14 credited and an immediate award of benefits directed." Harman v. Apfel, 211 F.3d 1172,  
15 1178, 2000 U.S. App. LEXIS 38646 at \*\*17 (9th Cir. 2000). It is appropriate where:

16 (1) the ALJ has failed to provide legally sufficient reasons for  
17 rejecting such evidence, (2) there are no outstanding issues that must  
18 be resolved before a determination of disability can be made, and (3)  
it is clear from the record that the ALJ would be required to find the  
claimant disabled were such evidence credited.

19 Harman, 211 F.3d at 1178 (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.1996)).

20 Here, outstanding issues must be resolved. See Smolen, 80 F.3d at 1292. The medical  
21 evidence is not conclusive and the degree to which plaintiff's alleged non-exertional impairments  
22 such as fatigue affected her ability to function in a work setting on a regular and continuing basis  
23 was not considered properly and depend, in part, on plaintiff's credibility and the lay opinion  
24 evidence.

1 The ALJ is responsible for determining credibility and resolving ambiguities and  
2 conflicts in the medical evidence. Reddick, 157 F.3d at 722; Andrews v. Shalala, 53 F.3d 1035,  
3 1043 (9th Cir. 1995). If the medical evidence in the record is not conclusive, sole responsibility  
4 for resolving conflicting testimony and questions of credibility lies with the ALJ. Sample, 694  
5 F.2d at 642; Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971); Calhoun v. Bailar, 626  
6 F.2d 145, 150 (9th Cir. 1980).

7 Therefore, remand is appropriate to allow the administration the opportunity to consider  
8 properly all of the lay opinion evidence and plaintiff's testimony as a whole and to incorporate it  
9 into the consideration of plaintiff's credibility and residual functional capacity. See Sample, 694  
10 F.2d at 642.

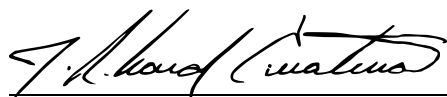
#### 11 CONCLUSION

12 The ALJ failed to consider properly the lay opinions, plaintiff's testimony and credibility  
13 and plaintiff's alleged fatigue. Therefore, this matter must be remanded so that the administration  
14 can reconsider plaintiff's residual functional capacity when properly crediting plaintiff's  
15 testimony, when properly reviewing the lay evidence and with proper consideration of all of  
16 plaintiff's non-exertional impairments, including fatigue.

17 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be  
18 **REVERSED** and **REMANDED** to the administration for further consideration pursuant to  
19 sentence four of 42 U.S.C. § 405(g).

20 **JUDGMENT** is for plaintiff and the case should be closed.

21 Dated this 30th day of August, 2011.

22 

23 J. Richard Creatura  
24 United States Magistrate Judge